

THE WAITANGI TRIBUNAL
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

WAI 2840
WAI 2666

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

AND IN THE MATTER of the Crown's Treaty settlement policy regarding overlapping claims and the proposed redress in relation to the Hauraki Collective, Marutūāhu Collective and individual Hauraki iwi settlements.

AND IN THE MATTER of a claim filed by **HAYDN THOMAS EDMONDS** on behalf of Ngātiwai Trust Board and the iwi of Ngātiwai for an urgent inquiry into the Crown's settlement policy regarding overlapping claims and the proposed redress in the Hauraki Collective, Marutūāhu Collective and individual Hauraki iwi settlements.

CLOSING SUBMISSIONS ON BEHALF OF NGĀTIWAI
8 May 2019



KAHUI
LEGAL

PO Box 1654

Telephone: (04) 495 9999

Facsimile: (04) 495 9990

Counsel: M Mahuika / K Tahana

WELLINGTON

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Introduction

1. These closing submissions are filed by Haydn Edmonds (Wai 2666 claimant) on behalf of the Ngātiwai Trust Board (**Ngātiwai**) and follow the hearing of the Wai 2840 claim on 8 to 12 April 2019.
2. The contested redress challenged by Ngatiwai is contained within deeds of settlement between the Crown and Hauraki (**Hauraki Settlements**) and the extent of the geographical reach is illustrated in redress maps.¹ These submissions address the following:
 - (a) the Crown's obligations to Ngātiwai in the context of the Hauraki Settlements;
 - (b) the Crown policies and processes with respect to overlapping claims in the context of Ngātiwai and the Hauraki Settlements;
 - (c) the conduct of the Crown in dealing with Ngātiwai in the context of the Hauraki Settlements;
 - (d) how the Crown's policies, processes and conduct breached the principles of the Treaty;
 - (e) the prejudice suffered by Ngātiwai as a result of the Crown's failure to comply with Treaty principles; and
 - (f) the recommendations the Tribunal should make to address the breaches and resulting prejudice.

EXECUTIVE SUMMARY

3. Ngātiwai says that the Crown has breached the principles of the Treaty as set out below.

¹ Attached as Appendix A is a table of the redress challenged by Ngatiwai as set out in the various deeds of settlement between the Crown and Hauraki. The maps are at #33(a) at pp 523, 530, 531 and 593.

4. **No upfront engagement:** the Crown had no upfront engagement process with Ngātiwai prior to offering redress to Hauraki²;
5. **Disregard for tikanga:** the Crown showed little regard for tikanga and provided no incentive on Hauraki to engage with Ngātiwai in accordance with tikanga. There were no consequences for Hauraki when Hauraki did not engage and the Minister proceeded to make final decisions;
6. **Failure to enquire into the meaning of tikanga concepts that go to the heart of customary interests:** the Crown relied on the Māori Land Court decision in *John Da Silva v Aotea Māori Committee & Hauraki Māori Trust Board*³ (*Da Silva*) as the basis for accepting that Hauraki had interests on Aotea but failed to investigate the meaning of the tikanga of whanaungatanga as set out in that decision;
7. **Failure to inquire into, and understand, the layers of customary interests:** the Crown's overlapping claims process did not enquire into the layers of interests as between Ngātiwai and Hauraki. As a result, the redress provided is offensive to tikanga and not aligned with the different rights afforded to different layers of interests;
8. **Flawed Crown assumption regarding non-exclusive redress:** the Crown proceeded on the flawed assumption that if redress is non-exclusive there is no prejudice to Ngātiwai;
9. **No information provided on nature of interests:** the Crown repeatedly ignored Ngātiwai's requests for an explanation of the basis for Hauraki's interests;
10. **Crown policy used against Ngātiwai to deny Ngātiwai a voice:** The Crown then wrongfully proceeded on the basis that it did not need to engage with Ngātiwai in relation to Hauraki overlapping claims issues because it was engaging with Ngātiwai hapū. This was despite Ngātiwai requesting that the Crown involve it in relation to all overlapping claims issues regarding Hauraki;

² Brief of Evidence of Haydn Thomas Edmonds (Wai 2840, #A60, 29 March 2019) at [5]. Mr Dreaver during cross-examination also acknowledged that the Crown did not have upfront hui with overlapping groups in any settlement negotiation that he can recall.

³ *John Da Silva v Aotea Māori Committee & Hauraki Māori Trust Board* 23/2/1998, 25 Tai Tokerau MB 212.

11. **Redress not commensurate with customary interests:** the redress offered to Hauraki is inconsistent with tikanga, an affront to the mana of Ngātiwai and confers influence and status on iwi of Hauraki that is not commensurate with Hauraki's interests;
12. **Unfair and unequal treatment:** the Crown did not provide Ngātiwai with the same opportunities in the overlapping claims process as was provided to Hauraki and other overlapping iwi⁴;
13. **Lack of openness and transparency:** the Crown process was not open or transparent so that Ngātiwai was not provided with information as to the nature of Hauraki interests at the same time as others and was not provided with Crown decisions. The Crown involved Ngātiwai much later than others and ignored Ngātiwai's concerns regarding lack of engagement by Hauraki and lack of information regarding Hauraki's interests;
14. **Crown failure to consider alternative redress:** the Crown failed to consider alternative forms of redress to ensure Hauraki received appropriate redress whilst at the same time preserving inter-tribal relationships and avoiding prejudice to Ngātiwai.

CROWN OBLIGATIONS UNDER TREATY OF WAITANGI

15. Attached to these submissions as **Appendix 2** is a summary of the relevant Tribunal reports setting out the Treaty of Waitangi principles applicable to the issues. Applying the observations of the Tribunal in the those Tribunal reports, the Crown's obligations include:
 - (a) **Upfront engagement:** to engage with Ngātiwai early in the overlapping claims process⁵ and prior to offering redress to Hauraki iwi. There were no upfront hui with Ngātiwai.
 - (b) **Program of hui:** to undertake a program of hui with Ngātiwai to discuss overlapping claims matters and instead adopting a focus on letter-writing.⁶

⁵ *Tāmaki Makaurau Settlement Process Report* (WAI 1362, June 2007) at 109.
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- (c) **Provision of information:** to provide information⁷ to Ngātiwai about the interests of Hauraki and Marutūāhu to enable Ngātiwai to provide meaningful input.
- (d) **Process to test information:** to have a process which tests information about the history and tikanga regarding Hauraki/Marutūāhu in Ngātiwai’s rohe. This should have included the holding of hui facilitated by the Crown on Aotea and the mainland to enable Ngātiwai to explain its interests.⁸
- (e) **Understand relationships:** to have a sophisticated understanding of how the groups operate and the relationships (arising from whakapapa and politics) at play between the groups.⁹
- (f) **Proactive action to facilitate resolution:** to only come to a decision about the disputed redress “as a last resort” after attempting to reconcile the competing views.¹⁰ The circumstances warranted proactive Crown action, such as, at a minimum, organising a facilitated hui or mediation.
- (g) **Tikanga process:** to undertake a tikanga process to enable it to better understand customary interests.¹¹
- (h) **No bias:** to act fairly and impartially towards all iwi¹² and not give advantage to one.

CROWN’S POLICY IN DEALING WITH OVERLAPPING CLAIMS

- 16. The Crown’s approach to the negotiation of historical Treaty of Waitangi claims is set out in the publication ‘Ka tika ā muri, ka tika ā mua - Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown’ 2018 (**Red Book**).

⁶ *Tāmaki Makaurau Settlement Process Report* (WAI 1362, June 2007) at 109.

⁷ *Tāmaki Makaurau Settlement Process Report* (WAI 1362, June 2007) at 109.

⁸ *Tāmaki Makaurau Settlement Process Report* (WAI 1362, June 2007) at 110; *Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (WAI 996, May 2003) at 54 and 59; and *Ngāti Awa Settlement Cross-claims Report* (WAI 958, July 2002) at 88

⁹ *Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (WAI 996, May 2003) at 61.

¹⁰ *Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (WAI 996, May 2003) at 54.

¹¹ See Appendix 2 attached.

¹² *Te Arawa Settlement Process Report* (WAI 1353, June 2007) at 64.

17. Ngātiwai submits that the *Red Book* is not Treaty compliant or consistent with the Tribunal's expectations of Treaty-compliant conduct as set out in the Tribunal reports in Appendix 2, as follows:
- (a) To “encourage” engagement alone does not give effect to the Crown’s duty to act in good faith and to act wherever possible to preserve amicable tribal relations. This is a proactive duty that requires more than mere encouragement. The Crown encouraged Hauraki to engage but then did nothing when they did not¹³;
 - (b) There is no reference to engaging early with all tāngata whenua groups before entering into terms of negotiation with the settling group.¹⁴ There is no reference to engagement being based on hui.¹⁵ Mr Dreaver acknowledged that the Crown did not have hui upfront to inform overlapping groups as to the program and issues for resolution;¹⁶
 - (c) The Red Book fails to acknowledge the importance of properly addressing the interests of non-settling groups in particular. If the Crown does not engage with non-settling groups early, then the Crown risks breaching their obligation to act fairly and impartially.
 - (d) The Red Book fails to acknowledge the importance of the Crown having a “sophisticated understanding of how Maori communities operate in general, and how the ones in question operate in particular”.¹⁷
 - (e) The Red Book fails to recognise the Crown’s fiduciary obligation to safeguard the interests of those who stand outside the negotiations.¹⁸
 - (f) The Crown should act with an ethic of openness. The Crown policy fails to identify what kinds of information should be withheld.¹⁹ In practice, Ngātiwai says this means information

¹³ See Appendix 4.

¹⁴ *Tāmaki Makaurau Settlement Process Report* (WAI 1362, June 2007) at 109.

¹⁵ *Te Arawa Settlement Process Report* (WAI 1353, June 2007) at 74-75.

¹⁶ Cross examination of Mr Dreaver by counsel for Ngātiwai

¹⁷ *Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (WAI 996, May 2003) at 61.

¹⁸ *Te Arawa Settlement Process Report* (WAI 1353, June 2007) at 63.

¹⁹ *Tāmaki Makaurau Settlement Process Report* (WAI 1362, June 2007) at 109.

regarding the basis for the settling party's interests be provided so that overlapping groups understand from a tikanga perspective the nature of those interests.

- (g) The Red Book does not require that the overlapping claims issues be consistent with tikanga or have been through a tikanga based process.
 - (h) The Red Book fails to acknowledge that issues surrounding cultural redress go to the heart of tribal identity and tikanga and go well beyond ensuring that redress of the same kind is available to others.²⁰
 - (i) The Red Book does not reflect the Tribunal's observation that the Crown should only itself come to a decision about matters in dispute as a **last resort** after it is evident that **attempts to reconcile** the competing views have failed.²¹
 - (j) The Crown's policy is driven by the Crown's ability to provide other redress to the overlapping party and not by formulating redress that does not offend tikanga.
18. Ms Anderson acknowledged that no changes have been made to the Red Book in so far as it relates to overlapping claims since it was first prepared and any changes to processes are not captured in writing.²² There is therefore no visibility of any changes to Crown processes unless and until these are articulated to overlapping groups.

FLAWED CROWN ASSUMPTION REGARDING NON-EXCLUSIVE REDRESS

19. The Crown continually asserted that particular redress was non-exclusive (eg, statutory acknowledgements) and therefore could be offered to more than one claimant (see Appendix 4). The assumption therefore was that there was no prejudice to Ngātiwai if non-exclusive redress within the rohe of Ngātiwai was offered to iwi of Hauraki.

²⁰ *Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (WAI 996, May 2003) at 59.

²¹ *Ngāti Tūwharetoa ki Kawerau Settlement Cross-Claim Report* (WAI 996, May 2003) at 54.

²² Cross-examination of Ms Anderson by Mr Ferguson.
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20. In relation to statutory acknowledgments, the Crown stated, as follows²³:

“A statutory acknowledgment ... is a non-exclusive redress tool. This means the same redress can be provided to more than one claimant group. The effect of a statutory acknowledgement is to provide additional consultation requirements for resource consent matters under the Resource Management Act 1991. A statutory acknowledgment does not confer any rights or exclusive interests in relation to the statutory area... A statutory acknowledgement also does not affect the lawful rights or interests of any person who is not a party to the deed of settlement that contains the statutory acknowledgment.”²⁴

21. During cross-examination, Ms Anderson acknowledged that a statutory acknowledgement may carry sway in terms of recognition of customary interests and that ‘the value of the instrument depends on the claimant groups and how they might want to use it’. She referred to Ngai Tahu as an example of how an iwi had obtained significant influence through such instruments.²⁵

22. Ms Anderson also acknowledged that references in settlement deeds as to an association of an iwi to a particular area or natural resource did not provide any clarity as to the interplay between those associations and the associations of other overlapping iwi to the same whenua or natural resource.²⁶ In the absence of different types of instruments, it is therefore left to the relevant local authorities to understand the different layers of interests and then consider whether some interests are to be given more weight than others.

23. The Crown’s assertion (as set out at paragraph 18 above) that statutory acknowledgements do not “affect the lawful rights or interests of others” is therefore contrary to the evidence of Ms Anderson as significant influence may be obtained through the use of these instruments and such influence will impact on the other iwi within the rohe. Hauraki iwi will gain a voice and influence over natural resources within the rohe of Ngātiwai in

²³ #A33(a) at p67

²⁴ #45(a) at p 216.

²⁵ Cross-examination of Ms Anderson by Mr Ferguson.

²⁶ Cross-examination of Ms Anderson by Counsel for Ngātiwai.

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circumstances where Ngātiwai has not yet had any settlement or received any redress that may confer the same or stronger rights on Ngātiwai. It is therefore incorrect for the Crown to be asserting that this does not prejudice Ngātiwai.

24. Ms Anderson also acknowledged that it was important for the Crown to understand different layers of interests.²⁷ She considered that when it comes to cultural redress, the bar is higher because the group needs to demonstrate their cultural association with the redress.²⁸ In the context of Ngātiwai and the Hauraki interests there was not however, any evidence of the Crown investigating the different layers of interests as between Ngātiwai and Hauraki and considering the role of tikanga concepts such as whanaungatanga when understanding those interests²⁹. The Crown, in Ngātiwai's submission, wrongly assumed that the interests of Marutuahu at Aotea as discussed by the Maori Land Court warranted the vesting of whenua in Marutūāhu.

CONDUCT OF CROWN AND BREACH OF TREATY PRINCIPLES

25. A comprehensive chronology of the Crown's conduct is attached as **Appendix 3** and a summary of engagement between Ngātiwai and the Crown is also attached as **Appendix 4**.

No upfront engagement

26. The Crown did not have any upfront engagement with Ngātiwai prior to offering redress to Hauraki in the Record of Agreement. The Ngātiwai evidence details how the Crown only engaged with Ngātiwai on the Record of Agreement after it had been signed and no upfront hui were held on Aotea or elsewhere.³⁰ This is despite wānanga having being held with Marutūāhu during 2011 and 2012.³¹ No corresponding wānanga were held with Ngātiwai so that the Crown could understand the nature of Ngātiwai's customary interests and the interplay between those interests and the interests of Marutūāhu.

²⁷ Cross-examination of Ms Anderson by Mr Ferguson.

²⁸ Cross-examination of Ms Anderson by Mr Ferguson.

²⁹ Mr Dreaver acknowledged that the Crown did not enquire into tikanga concepts. Cross examination of Mr Dreaver by counsel for Ngātiwai.

³⁰ Affidavit of Tania McPherson (Wai 2840, #A33, 18 February 2019) at [24], [31] and [57]-[60] and Brief of Evidence of Haydn Thomas Edmonds (Wai 2840, #A60, 29 March 2019) at [5].

³¹ #A45 at para 125.
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27. Mr Dreaver during cross-examination conceded that no upfront hui had ever happened in any negotiation he has been involved with.³²
28. The absence of any upfront engagement meant that Ngātiwai had no visibility of the overall timeframes and work program of the Crown. Ngātiwai was prejudiced in its ability to be able to ensure the interests of Ngātiwai were understood and then reflected in the redress offered to Hauraki.

No incentive to engage in accordance with tikanga

29. There was only ever one meeting between representatives of Ngātiwai and the negotiator for Marutūāhu.³³ Ngātiwai repeatedly informed the Crown that Marutūāhu and other Hauraki iwi were refusing to engage and requested the Crown to assist:
- (a) 1 April 2014 – Ngātiwai to Crown: “attempts to discuss with Marutūāhu were unsuccessful”³⁴;
 - (b) 25 July 2014 – Ngātiwai informed the Crown that “we have been unsuccessful in securing an opportunity to meet with the Marutūāhu Collective and are unaware of any other spokespeople to contact regarding the specific and remaining iwi mentioned above [Ngāti Pāoa, Ngāti Maru, Ngāti Tamaterā, Ngāti Whanaunga and Te Patukirikiri]. The lack of notification from OTS of any other spokespersons on behalf of those individual Iwi mentioned above is of grave concern to us”³⁵;
 - (c) 20 September 2016 – Ngātiwai requested that if “the Crown is willing to take the initiative and help facilitate the organisation of meetings with specific Marutūāhu iwi concerned we would have no difficulty attending to those meeting [sic] after 6 October 2016”,³⁶
 - (d) On 10 October 2016, the Crown responded as follows:³⁷

³² Cross examination of Mr Dreaver by counsel for Ngātiwai.

³³ ##A45 at para 134, #A8 at para 34.

³⁴ #A33(a) at p 71-72.

³⁵ #A33(a) at p 16.

³⁶ #A33(a) at p223

³⁷ #A33(a) at p261

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*I am pleased you are willing to meet with Marutūāhu iwi. I have advised the Marutūāhu iwi **their willingness to meet with you would be an important factor** if you cannot resolve your differences, and I need to consider a final decision.*

- (e) Again in a meeting with the Crown on 31 January 2017, Ngātiwai states:³⁸

We have had a very poor response from many of the Marutūāhu iwi to meet with us. We provided an extensive response to the Marutūāhu iwi specific proposals in something like 23 or 24 pages and put our position on that one. However, the Minister seems to think it was okay to proceed anyway, despite the fact that not one of those Iwi have met with us.

30. While the Crown conveyed Ngātiwai's wish to meet with the various Marutūāhu representatives,³⁹ the Crown took no action when those representatives did not respond to Ngātiwai and proceeded to make final decisions.⁴⁰ In the Minister's letter to Ngātiwai on 11 November 2016, he stated that:⁴¹

I am advised representatives of Ngātiwai and Marutūāhu iwi have not met, but that you have discussed the issues between you with Ngāti Maru negotiator Paul Majurey and this discussion did not resolve any of the overlapping claims. My preference is always for iwi to reach agreement amongst themselves. However I know this is not always possible. This means I must make, on behalf of the Crown, final determination on the redress the Crown will offer.

31. The evidence is undisputed. Only one face to face introductory café meeting was held between the Marutūāhu negotiator and representatives of Ngātiwai. This occurred in October 2013 – approximately 3 years prior to the Minister's letter referred to above. That was the first and last

³⁸ #A33(a) at p349

³⁹ #A33(a) at p263.

⁴⁰ #33(a) at p299.

⁴¹ #33(a) at p299

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meeting and did not include discussion of the matters that were the subject of the Minister's final determination as that redress was not communicated to Ngātiwai in 2013. The Minister nevertheless proceeded on the basis that this was sufficient and despite his assurances some one month earlier that the willingness of Marutūāhu to meet would be an important factor. It turns out it was not important to the Crown and had no impact on the Crown's final decision.

32. It is submitted that this demonstrates the lack of regard and importance the Crown places on requiring settling iwi to engage with overlapping claimants. There is simply no consequence if they do not.
33. Again on 15 March 2017, in the context of responding to the Crown's requests for feedback on a range of redress including protocols and fisheries quota RFR, Ngātiwai again informs the Crown of the unwillingness of Hauraki iwi to engage with Ngātiwai, as follows:⁴²

It should be noted that the Board have not been able to organise hui with any of the overlapping groups concerned and nor have any of them made any real attempts to contact us for the purpose of discussing their overlapping claims. On the basis that no hui have taken place to discuss these matters consistent with tikanga Māori and no research or historical advice has been provided to the Board to support the proposed redress this is a preliminary response only.

34. In July 2017, prior to filing its application with the Tribunal, Ngātiwai asked the Crown to remove offending redress and requested that a tikanga based resolution process between Ngātiwai and Hauraki iwi take place.⁴³ The Crown declined the request to withdraw redress offers to Hauraki iwi and encouraged Ngātiwai to engage with Hauraki iwi.⁴⁴ It is submitted that the Crown's encouragement was meaningless and carried no weight in circumstances where the Crown was fully aware that Hauraki iwi were not willing to engage.
35. Ngātiwai again communicated this concern to the Crown prior to filing its urgency application in August 2017 but the Crown continued to do

⁴² #A33(a) at 372 and at p377.

⁴³ #A33(a) at p 463.

⁴⁴ #33(a) at p470-471.

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nothing and was willing to proceed knowing full well that no hui had taken place:⁴⁵

“It is not enough for the Crown to “encourage” Ngātiwai to engage with Hauraki iwi in circumstances where the Crown is fully aware that such engagement is not taking place, despite repeated requests by Ngātiwai to engage. The Crown cannot sit back and leave overlapping issues to iwi or expect Ngātiwai to accept the Crown’s redress when there has been no tikanga based process to enable Ngātiwai to understand the nature of Hauraki’s interests within the Ngātiwai rohe. For the Crown to offer redress in a manner that takes no account of tikanga or mana whenua, is to take sides and to act contrary to its obligations as a Treaty partner. This approach is creating divisions between iwi.

36. The refusal of Hauraki iwi to engage had no consequence. Ms Anderson acknowledged that the Crown does not require a tikanga based process⁴⁶ although the Crown is now discussing options as a result of more recent discussions with the Iwi Leaders Group.⁴⁷ In Ngatiwai’s submission, encouragement without any consequence is equal to a disregard for tikanga and contrary to the principles of the Treaty.
37. The concern of Ngatiwai in not requiring a tikanga process was articulated by Aperahama Edwards to the Tribunal and explains the importance of these issues being discussed in accordance with tikanga.⁴⁸

“He pahi ana mātou, e hiahia ana mātou kia pērā ka hia nei ngā tono i puta atu i a mātou kia hui tahi mātou i o mātou huānga o Marutūāhu engari kāhore i tutuki. Koia tērā ko tā mātou hiahia, ko tā mātou wawata kia āta kōrerohia i ēnei kōrero i runga i te ngākau tika i te wāhi tika. Ki taku mōhio kotahi noa iho te hui kua tū i waenganui i te poari o Ngātiwai me ngā hunga nei. I tū ki tētahi wharekai Pākehā i te taha o te rori i waenganui o Whangarei me Akarana. Ehara tērā i te wāhi tika hei whiriwhiri ēnei tūmomo kaupapa...

⁴⁵ #33(a) at pp 473-474

⁴⁶ Cross examination of Ms Anderson by Ngatiwai counsel.

⁴⁷ Cross examination of Ms Anderson by Mr Ferguson.

⁴⁸ Questioning of Aperahama Edwards by Mr Ruakere Hond.
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Kei konā o mātou kōiwi tūpuna e takoto tonu mai ana nā reira, āe, ko tā mātou hiahia nui kia hui tahi ki o mātou whanaunga ki o mātou hūanga ki te āta whiriwhiri i ēnei tūāhuatanga i raro i ngā tikanga tuku iho a o tātou tāpuna mātua.”

Disregard for tikanga concepts underpinning customary interests

38. The Crown relied on the *Da Silva* Decision as the basis for accepting that Hauraki had interests on Aotea but failed to investigate the tikanga of whaungangatanga set out in that decision. In the *Da Silva* Decision, the Court found that:⁴⁹

*... the Court determines the owners of the islands and rock outcrops ... to be Ngāti Rehua, to hold the same as kaitiaki for themselves and, in accordance with the **tikanga of whanaungatanga**, for Ngāti Wai ki Aotea and Marutūāhu ki Aotea. [emphasis added]*

39. The Crown did not seek to obtain any input from Ngātiwai or other iwi as to the meaning of the tikanga of whanaungatanga. Mr Dreaver acknowledged that the Crown did not enquire into the tikanga implications of customary rights and how those rights might be recognised in a manner that is consistent with tikanga⁵⁰.
40. Further, the Tribunal in the Tamaki Makaurau Report noted how important whanaungatanga is, as follows⁵¹:

Whanaungatanga – relatedness – lies at the core of being Māori. Te taura tangata is the cord of kinship that binds Māori people together through whakapapa ; it is a braid that is tightly woven, tying in all its strands. It is unbroken and infinite. ...

Because of the connections between all of the people, and all of their connections to the land, dealing with all of the interests well is subtle and challenging work. It involves the Office of Treaty Settlements team forming relationships not only with those who are settling but also with those who for the time being are not. It is vital that this part of the settlement process is done well, but for the most part it seems to us that it is not being done at all. The Office of Treaty Settlements' focus on the settling group is such that dealing with the other tangata whenua groups is very much secondary, both in terms of priority and timing.

The consequences of this are serious. The purpose of settling Treaty claims is, broadly speaking, peace and reconciliation. By settling, the

⁴⁹ *Da Silva* Decision at p30.

⁵⁰ Cross examination of Mr Dreaver by counsel for Ngātiwai.

⁵¹ At page 2 of the Tamaki Makaurau Report.

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*Crown 'hopes to lay the basis for greater social cohesion'.² Such objectives can be achieved only when both the process and the outcome of negotiating and settling are manifestly fair – not only to the settling party but also to others affected. The burden on both Māori and Pākehā of the great wrongs that were done in the past³ will not be lifted if the process of settling creates new wrongs. We consider that the process for settling now being followed is creating divisions within Māori society that are very damaging. **Damage to whanaungatanga, to te taura tangata is a great wrong:** it affects Māori society at its very core. As we will explain in this report, it also goes to the heart of the Treaty guarantees in article II.*

41. Despite the above observations of the Tribunal and acknowledgement by Mr Dreaver that the Crown were very aware of the Tribunal's recommendations,⁵² in the context of Ngātiwai, the Crown did not seek to engage with Ngātiwai to understand the interests of Ngātiwai and how whanaungatanga connects Ngātiwai and Ngāti Rehua or Hauraki. No investigation was undertaken as to the various layers of interests. Rather, the Crown took the *Da Silva* Decision as confirmation that it was appropriate to offer whenua on Aotea as redress for Marutūāhu knowing that this caused significant offence, as a matter of tikanga, to Ngātiwai and Ngāti Rehua.
42. Further, in contrast the hui that Ngātiwai had with Ngāti Hako and Ngāti Pāoa in 2018, demonstrates the value of tikanga processes as communicated from Ngātiwai to the Crown.⁵³

I am pleased to report some positive developments with Ngāti Hako and Ngāti Paoa whom we met with in May to commence a tikanga based process for resolving overlapping claims. In each case it was agreed to have further hui to address the matters we raised with them. We value these exchanges as they reinforce our intertribal relationships and our tikanga.

43. Unfortunately, the tikanga process between Ngāti Hako and Ngātiwai ceased as a result of the Crown issuing a decision to remove the reference to Aotea from the statement of association provided to Hako prior to the parties having finished having hui to discuss the issues.⁵⁴ The

⁵² Cross examination of Mr Dreaver by counsel for Ngātiwai.

⁵³ #33(a) at 537.

⁵⁴ #33(a) at 539 and #33 at para 149.

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hui however, resulted in Ngāti Hako not being able to explain its connection to a pa site on Aotea and shows why such hui are important.⁵⁵

Information not provided to Ngātiwai

44. Ngātiwai repeatedly requested information from the Crown regarding the interests of Hauraki⁵⁶ and the Crown repeatedly ignored those requests until Ngātiwai made an OIA request. The requests by Ngātiwai included:
- (a) 6 June 2013 – Ngātiwai to Crown “... the documentation does not clarify the nature and extent of the interest”⁵⁷;
 - (b) 31 October 2013 – Ngātiwai to Crown “nature and extent of Marutūāhu’s interests in the draft Record of Agreement is not clear”⁵⁸;
 - (c) 31 October 2013 – Crown response states redress is non-exclusive. No information provided regarding Marutūāhu’s interests⁵⁹;
 - (d) 15 May 2014 – Crown to Ngātiwai informing them that the Crown is engaging with Ngāti Rehua and on the mainland the coastal statutory acknowledgment redress is non-exclusive. No information provided regarding Marutūāhu’s interests;⁶⁰
 - (e) 25 July 2014 – Ngātiwai to Crown “we have not been provided with any information substantiating any such claims or provided the opportunity to comment on such claims”⁶¹;
 - (f) 19 October 2016 – in response to an OIA request, the Crown provides Ngātiwai with two research documents (Wai 406 and Wai 1362; an independent assessment by David Armstrong

⁵⁵ Cross examination of Aperahama Edwards.

⁵⁶ See appendix 4 for an overview of the correspondence and requests made by Ngātiwai.

⁵⁷ #33(a) at p5

⁵⁸ #33(a) at p69

⁵⁹ #A33(a) at p67

⁶⁰ #A33(a) at p 73

⁶¹ #33(a) at p 74 and #A2(a) at p 209.

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commissioned to provide research into the customary interests on Aotea; and an internal draft OTS memorandum.⁶²

45. In addition, in 2014 the Crown did not share its decisions with Ngātiwai regarding redress relevant to Aotea and Ngātiwai became aware of these decisions as a result of an OIA request⁶³.
46. The events set out at Appendix 4 demonstrate how difficult it was for Ngātiwai to receive information so that it could understand how, and if, Hauraki iwi had connections to the rohe of Ngātiwai. The Crown was not forthcoming with this information and rather, sought to disregard Ngātiwai's concerns by making assurances about non-exclusive redress or informing Ngātiwai that it was engaging with Ngātiwai hapū. There was no respect for Ngātiwai as the iwi or understanding as to why engagement with Ngātiwai was important.⁶⁴

Lack of openness and transparency

47. The chronologies and events set out in appendices 3 and 4 demonstrate how the Crown process was not open or transparent so that Ngātiwai was not provided with information as to the nature of Hauraki interests at the same time as others and was not provided with Crown decisions. Ngātiwai was not given visibility of the Crown's overall work programme. Decisions were not shared with Ngātiwai. Ngātiwai had to request information in letters and then resort to OIA requests when no information was forthcoming (see Appendix 4).
48. Appendix 4 sets out the manner in which the Crown engaged with Ngātiwai and shows a consistent lack of openness.

Unfair and unequal treatment

49. The Crown did not provide Ngātiwai with the same opportunities to participate and be heard in the overlapping claims process as was provided to Hauraki and other overlapping iwi. As a result, Ngātiwai is left

⁶² #A33(a) at p271 exhibit, A exhibit B and Exhibit C

⁶³ #A33(a) at p81-82 and, #33(a) Exhibit A para 44.

⁶⁴ See Appendices 3 and 4 for full overview of correspondence between the Crown and Ngātiwai. KXT-102021-1-1387-V6

to choose from the remaining redress when settling. This is also demonstrated by the events set out in Appendix 4.

Crown policy used against Ngātiwai to deny Ngātiwai a voice

50. The Crown policy of settling claims geographically resulted in the Crown assuming that it did not need to engage with Ngātiwai. Mr Dreaver acknowledged that he considered that it was appropriate for the Crown to be engaging with the hapū and not Ngātiwai.⁶⁵ This is despite Ngātiwai supporting their hapū but also requesting engagement on overlapping issues with Hauraki. This approach was offensive to the mana of Ngātiwai and undermined the relationship between the Crown and Ngātiwai.
51. The impact of splitting Ngātiwai in this way is like cutting the tail off a kahawai and was explained by Aperahama Edwards during questioning by the Tribunal at the hearing:⁶⁶

“Ko Ngātiwai, Ko Ngāti Rehua e kore e taea te wehewehe. Ko rātou ano ko mātou.”

“Koirā tā mātou hōhā ki te roherohenga o ngā papa whakatau i ngā kerēme nā te mea i roherohengia a Tāmaki, i roherohengia a Te Paparahi o Te Raki i reira ka pawharaungia a Ngātiwai pēnei i te kahawai pāwhara ko tētahi pito o Ngātiwai, i meinga ki roto o Tāmaki ko te nuinga atu i pana ki roto i te Tai Tokerau kua weherua a Ngātiwai i tērā mahi a te Karauna.

52. The Crown approach has impacted the internal relationships within Ngātiwai and created unnecessary division, which has then be used against Ngātiwai to deny Ngātiwai a voice in the context of the Hauraki overlapping claims settlement process.

Crown failure to consider alternative redress

53. There is no evidence before the Tribunal of any attempt by the Crown to consider alternative redress such as providing additional properties within the rohe of Hauraki rather than in contentious overlapping areas such as

⁶⁵ Cross examination of Mr Dreaver by Ngātiwai counsel.

⁶⁶ Response by Aperahama Edwards to question from Mr Ruakere Hond.
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Aotea and Mahurangi. Nor is there any evidence of the Crown considering how it may provide the same value to Hauraki iwi through the settlement without causing inter-tribal divisions and an affront to the mana of Ngātiwai.

54. While Ms Anderson acknowledged that the Crown are now working with the Iwi Leaders Group to discuss overlapping claims and consider alternatives, such as tikanga based processes, there is no evidence that the Crown considered using these processes for the Hauraki settlements.⁶⁷

PREJUDICE SUFFERED BY NGĀTIWAI

55. It is submitted that the Crown's conduct in contravention of Treaty principles has resulted in the following prejudice:
- (a) The Crown not considering the nature of the layers of interests as between Ngātiwai and Hauraki. This has meant that Ngātiwai's position has been irreversibly prejudiced because the Crown is proposing to vest whenua in Hauraki based on Hauraki's alleged customary interests when those interests do not justify the vesting of whenua.
 - (b) the prejudice to Ngātiwai includes
 - (i) an affront to the mana of Ngātiwai;
 - (ii) the rangatiratanga of Ngātiwai is diminished;
 - (iii) redress whenua is not available to Ngātiwai as part of its settlement;
 - (iv) the vesting of whenua as cultural redress implies that Marutūāhu has mana whenua on Aotea. Marutūāhu consider that they have mana whenua on Aotea and rely on the *Da Silva* decision as the basis for that assertion.⁶⁸ In Ngātiwai's submission this is not correct and a tikanga based process would enable the parties to understand and

⁶⁷ Cross examination of Ms Anderson by Mr Ferguson.

⁶⁸ #A48(a) at p288 to 289 – email from P Majurey to Leah Campbell.
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appropriately determine how, as a matter of tikanga, the interests of Marutūāhu should be appropriately recognised.

RECOMMENDATIONS OF TRIBUNAL

56. Ngātiwai submits that the Tribunal recommend that:

- (a) the Crown remove the redress from the Hauraki Settlements as set out in Appendix 1 and provide alternative redress (eg, properties within the Pare Hauraki redress area and/or cash of an equivalent value), which will enable the Crown to proceed with the settlement;
- (b) the Crown revise its overlapping claims policy so that (consistent with the principles of the Treaty of Waitangi);
 - (i) the Crown is required to make enquiries of overlapping parties to understand their respective interests (and the layers of those interests) before the Crown formulates and offers redress;
 - (ii) information provided to the Crown regarding the customary interests of a settling iwi in an overlapping area be made available to overlapping parties and overlapping parties be provided an opportunity to respond to that information;
 - (iii) the Crown require overlapping parties to undertake a process, based on tikanga, to resolve overlapping claims issues before it will finalise the relevant settlement so that there is no incentive to ignore tikanga;
- (c) the Crown, remove the map containing fixed boundary points to which the Hauraki Collective Fisheries RFR relates before proceeding to introduce settlement legislation in relation to the Hauraki Deed of Settlement;
- (d) the Crown establish an independent process based on tikanga to determine the customary interests of Hauraki iwi and Ngātiwai; and
- (e) an independent dispute resolution process is established between the Crown, Hauraki iwi and Ngātiwai to consider the customary interests above and to determine appropriate terms of any

settlement redress to be offered to Hauraki iwi within the Ngātiwai rohe;

- (f) a separate inquiry be undertaken in relation to the historical claims of Ngātiwai (as Ngātiwai has been prejudiced by the Crown policy resulting in Ngātiwai hapū being being split for settlement purposes); and
- (g) the Crown pay claimant costs associated with participation in the Tribunal hearings.

DATED this 8th day of May 2019



Kiri Tahana

Appendix 1	Table – Redress Challenged by Ngātiwai
Appendix 2	Table – Summary of Waitangi Tribunal Reports
Appendix 3	Table – Chronology of Crown Conduct
Appendix 4	Summary of Crown Engagement 2013 to 2017